The District Court then empanelled the jury and the trial proceeded for the next six days. (JA 1195, 2087-2088) On July 20, 2004, after hearing the evidence, argument and instructions, and after deliberating for several hours, the jury returned a verdict, finding that Sugar Mountain was not negligent. (JA 2087-2088)

After the verdict, Plaintiffs filed a Motion for New Trial on several grounds, including the District Court's refusal to reopen jury selection as to Nicholson and McDonald. (JA 2090). Plaintiffs produced no evidence suggesting that jurors Nicholson or McDonald were biased against them during deliberations. Plaintiffs did not ask for a post-trial hearing to determine whether these jurors were actually biased. The District Court denied the motion for new trial. (Pet. App. at 14a-19a).

On appeal, Plaintiffs argued that the District Court erred in refusing to reopen voir dire and erred in denying their motion for new trial. (Pet. App. at 7a-9a). Plaintiffs again failed to ask the Fourth Circuit to remand the case for a hearing to determine juror bias. The Fourth Circuit rejected Petitioner's arguments and affirmed the District Court. (*Id.*)

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit correctly determined that the District Court did not err in refusing to reopen voir dire.

A. The Fourth Circuit correctly deferred to the District Court's determination that the voir dire was adequate.

The Fourth Circuit did not hold, as contended by the Petitioners, "that federal trial courts do not have to provide an opportunity to prove actual bias when a juror's partiality is questioned." (Pet. at 1). On the contrary, the Fourth Circuit simply held that the District Court did not abuse its discretion in refusing to reopen voir dire examination. In so holding, the Fourth Circuit applied the correct standard of law to the facts of this case.

This Court has stated that "[b]ecause the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire." *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981); *See also Mu'Min v. Virginia*, 500 U.S. 415 (1991). In particular, "[w]hether to reopen voir dire and what questions to permit is largely within the discretion of the district court." *U.S. v. Adams*, 305 F.3d 30, 35 (1st Cir. 2002); *See also Andrews v. Scott*, 21 F.3d 612 (5th Cir. 1994); *Soria v. Johnson*, 207 F.3d 232 (5th Cir. 2000); *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002).

B. The Fourth Circuit correctly determined that the District Court had a sufficient basis to refuse to reopen voir dire.

The Fourth Circuit found "ample grounds for deferring" to the District Court's determination that "the voir dire was adequate on matters of potential bias." (Pet. App. at 7a). As noted by the Fourth Circuit, the District Court asked the jurors a number of questions to determine whether they could be fair and impartial. (JA 1128-1131, 1169-1170). All of the jurors acknowledged they could, including jurors Nicholson and McDonald. *Id.* Under questioning by Plaintiffs' counsel, Nicholson and McDonald acknowledged they could give the parties a fair trial. (JA 1134-1174) Under questioning by Defense counsel, jurors Nicholson and McDonald again acknowledged they could be fair. (JA 1181, 1189).

Although Nicholson indicated that the president of his company was a ski patroller at an unknown resort, he said they had only had "friendly, casual conversations" about it. (JA 1176). Although McDonald indicated her best friend's son owned a ski shop in Asheville, she said she could disassociate her feelings about him from the case. (JA 1181-1185, 1189) Neither juror was employed by Sugar Mountain, nor had any family members who were employed by Sugar Mountain. (JA 1123-1131, 1169) In fact, neither juror had ever skied at Sugar Mountain. (JA 1172-1173, 1176) It is highly unlikely the court could impanel a Western North Carolina jury without someone having at least a remote connection with the ski industry. Regardless, a remote connection with the ski industry is not itself evidence of potential bias in favor of Sugar Mountain.

Based on the responses by all the jurors, including Nicholson and McDonald, and based on their demeanor and credibility, the District Court determined that "had there been some bias or prejudice that would affect their verdict, it would have been uncovered." (JA 1194) The District Court Judge was in the best position to make this determination and Petitioners have offered only speculation to rebut it. Petitioners have offered no evidence, by affidavit or otherwise, which shows that either Nicholson or McDonald was at all biased against the Plaintiffs during jury deliberations. In the absence of any evidence that these jurors' tenuous relationship to the ski industry had any effect on the proceedings, the request to reopen voir dire was properly denied by the District Court. *See Andrews*, 21 F.3d at 621; *Soria*, 207 F.3d at 240-241. As such, the Fourth Circuit correctly determined that the District Court did not abuse its discretion in denying Plaintiffs' request to reopen voir dire.

II. The Fourth Circuit decision is consistent with established Supreme Court precedent dealing with voir dire examination.

A. The proper standard of review is set forth in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984).

The Fourth Circuit correctly relied on the principles set forth in *McDonough v. Greenwood* in holding that a new trial was not warranted in this case. Under *McDonough*, this Court held that to obtain a new trial, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556. Applying *McDonough*, the Fourth Circuit correctly concluded that Petitioners failed to demonstrate that the jurors failed to answer honestly a question by Petitioner's counsel. (Pet. App. at 8a).

The Fourth Circuit agreed with the District Court that the question posed by Petitioners' counsel was logically interpreted by the jurors to be limited to their family ties to the ski industry, as opposed to the broader question of whether they knew anyone connected with the industry. (*Id.*) The Fourth Circuit noted that the Petitioners' "inability to obtain the information they sought during voir dire is attributable to their failure to state their question clearly, not the jurors' failure to answer the question honestly." (Pet. App. at 9a). On that basis, the Fourth Circuit correctly affirmed the District Court's denial of Petitioners' Motion for New Trial.

B. The Fourth Circuit decision is distinguishable from, but consistent with, *Remmer v. U.S.*, 347 U.S. 227 (1954) and *Smith v. Phillips*, 455 U.S. 209 (1982).

Having lost the issue twice in the lower courts, Petitioners have abandoned their once heavy reliance on *McDonough* and now seek to rest their case on *Remmer v. U.S*, 347 US. 227 (1954) and *Smith v. Phillips*, 455 U.S. 209 (1982), arguing that the Fourth Circuit decision "undermines" these cases. In fact, *Remmer* and *Smith* are clearly distinguishable from the present case.

Remmer and *Smith* stand for the proposition that if there are allegations of serious juror impartiality or misconduct, then a defendant in a *criminal case* may be entitled to a post trial hearing to determine whether the juror was actually biased against him. *See Smith*, 455 U.S. at 215; *Remmer*, 347 U.S. at 229-230.

In *Remmer*, after the jury returned a verdict, the defendant taxpayer learned that the foreman of the jury had been

approached about a possible bribe by an unknown person. *Remmer*, 347 U.S. at 228. The Court remanded the case to the District Court to conduct a hearing to determine whether the incident "was harmful to the petitioners, and if after hearing it is found to have been harmful, to grant a new trial." *Id.* at 230.

In *Smith*, after the defendant's conviction of murder, he learned that one of the jurors had applied for a job as a major felony investigator in the district attorney's office during the trial. *Smith v. Phillips*, 455 U.S. 209, 212 (1982). Upon motion of the defendant, the district court conducted a hearing at which the juror explained his actions and the court concluded that the juror was not biased against the defendant. *Id* at 213. The Supreme Court held that the defendant's rights had been protected by the hearing and that he was not entitled to a new trial. *Id.* at 217.

Petitioners in the present case have failed to show any evidence of juror impartiality or misconduct on the part of jurors Nicholson or McDonald of the type involved in *Smith* and *Remmer*. Moreover, Petitioners have never asked for a post trial hearing to determine whether these jurors were actually biased against them, thereby waiving any right to seek one now. "[W]hen a party fails to raise a theory at the district court level, that theory is generally regarded as forfeited and cannot be advanced on appeal." *U.S. v. Torres*, 162 F.3d 6, 9 (1st Cir. 1998). Thus, the Fourth Circuit decision is distinguishable from, but consistent with, *Smith* and *Remmer*.

III. The Fourth Circuit decision is consistent with Fourth Circuit precedent and does not create a split between the Circuits.

A. The Fourth Circuit recently held that the trial court was not obligated to conduct an evidentiary hearing about matters that were fairly discoverable during voir dire.

In the recent case of *Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006), the Fourth Circuit squarely addressed the issue argued by Petitioners in the present case – whether the District Court erred in failing to conduct an evidentiary hearing to prove actual bias. In *Billings*, the defendant appealed his conviction on the grounds that one of the jurors allegedly failed to answer honestly certain questions in *voir dire* and failed to disclose certain information regarding her feelings about defense counsel. *Id.* at 244. After concluding that the juror did not answer a material question dishonestly under the *McDonough* test, the Court considered whether the trial court erred in not holding an evidentiary hearing to determine whether the juror was actually biased. *Id.* at 245. Noting that it was not clear whether defendant asked for an evidentiary hearing, the Court held that even if he did, the trial court was not required to hold a hearing because the defendant "had ample opportunity at *voir dire* to discover" the information sought from the juror. *Id.*

The Court stated that *Smith v. Phillips*, *supra*, does not require a court "to hold an evidentiary hearing any time that a defendant alleges juror bias, regardless of whether he utilized the pre-trial procedures available for ensuring the jury's impartiality." *Id.* at 246-267. The Court cautioned that

> [o]therwise, defendants would be able to sandbag the courts by accepting jurors onto the panel without

> exploring on *voir dire* their possible sources of bias and then, if their gambit failed and they were convicted, challenging their convictions by means of post-trial evidentiary hearings based on newly discovered evidence of possible juror bias.

Id. Therefore, the Court held that the trial court was not obligated "to hold a post-trial evidentiary hearing about matters that were fairly discoverable on *voir dire.*" *Id.*

In the present case, Petitioners had an unfettered opportunity to conduct voir dire examination of the prospective jurors about any matter they deemed relevant. Petitioners' failure to discover information about jurors Nicholson and McDonald during their questioning did not entitle them to reopen voir dire after they had passed the jury. It certainly did not entitle them to a post-trial evidentiary hearing to determine juror bias. As noted by the Fourth Circuit, "a trial court has broad discretion to determine whether to order a hearing on a claim of juror bias." (Pet App., at 9a). As such, the Fourth Circuit correctly determined that the District Court did not abuse its discretion in declining to hold a hearing or permit further questioning on the issue of actual bias.

B. The Fourth Circuit decision is distinguishable from, but consistent with, *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977).

Petitioners' reliance on *United States v. Rucker* is misplaced. In *Rucker*, the voir dire consisted only of written questions to the jury. Two of the jurors failed to answer specific questions regarding their physical and mental capacity to serve. The Court held that when the trial court

has "reason to believe from information supplied by the veniremen themselves that one of them may well have lacked, and one did lack, physical or mental capacity to serve as jurors, the defendant's request for a specific inquiry was reasonable and should have been granted." *Rucker*, 557 F.2d at 1049.

Unlike *Rucker*, the District Court in the present case allowed both parties to ask extensive voir dire questions and also asked a number of questions itself. Based on all the answers given, the District Court found no indication of bias. Unlike the jurors in *Rucker*, there was no "ambiguity" about the fitness of Nicholson or McDonald to sit on the jury. They were both competent to serve and gave no indication that they were biased against Petitioners. Thus, the Fourth Circuit correctly determined that the trial court did not err in refusing to reopen voir dire.

C. The Fourth Circuit decision does not create a split between the Circuits.

None of the cases cited by Petitioners create a conflict with the Fourth Circuit's decision in the present case. In *Caterpillar v. Sturman Industries, Inc.*, 387 F.3d 1358, 1371 (Fed Cir. 2004), the Court held that a juror who was married to a Caterpillar employee was impliedly biased as a matter of law and should have been dismissed for cause. *Caterpillar* has no relevance to the present case because Petitioners have not argued that jurors Nicholson or McDonald were impliedly biased.

U.S. v. Torres, 128 F.3d 38 (2nd Cir. 1997) is equally inapplicable. In *Torres*, the Court held that the trial judge did not abuse its discretion in dismissing several jurors for cause based on implied and inferred bias. Petitioners have not argued that the District Court erred in dismissing any of the jurors for cause.

U.S. v. Gillis, 942 F.2d 702 (10th Cir. 1991) and *Fietzer v. Ford Motor Company*, 622 F.2d 281 (7th Cir. 1980) were criminal cases in which the trial court conducted the voir dire and did not permit the parties to ask any questions. In *Gillis*, the jury panel included people who had served as jurors for an earlier case in which the defendant was tried for a similar crime. The Court held that the trial court's failure to ask the jurors about possible bias related to serving on the prior panel was reversible error. In *Fietzer*, a products liability case involving a Ford Comet, the Court held that the trial court committed reversible error in failing to inquire about whether the jurors had been involved in similar car accidents, owned a Ford Comet, or had seen any pre-trial publicity. *Fietzer*, 622 F.2d at 286.

In the present case, the District Court allowed both sides to conduct voir dire about any matter they deemed relevant. After satisfying themselves, Petitioners passed the panel to Defense counsel. The fact that some new information came to light during Defense counsel's questioning did not compel the District Court to reopen voir dire. The new information – that juror Nicholson worked with a person who was a ski patroller at an unknown resort and that juror McDonald's best friend's son owned a ski shop – was not the type of information that required additional inquiry. Both jurors had already denied any prejudices that would affect their ability to sit on a jury involving a ski accident. Both jurors had repeatedly stated that they could be fair and impartial. Based on the entire voir dire examination, the District Court did not abuse its discretion in denying additional questioning. Thus, the Fourth Circuit's opinion upholding that decision does not conflict with any of the cases cited by Petitioners from other jurisdictions.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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